LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUL 29 1963
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. 315

THE AUSTIN COMPANY,

Petitioner,

vs.

UNITED STATES,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

To United States Court of Claims.

LEWARD C. WYKOFF,
THOMAS V. KOYKKA,
EDWARD C. ADKINS,
Arter, Hadden, Wykoff & Van Duzer,
1144 Union Commerce Building,
Cleveland 14, Ohio,
Attorneys for Petitioner.

July 24, 1963.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-5647

TABLE OF CONTENTS.

Opinion of United States Armed Services Board of Contract Appeals 1

Opinion and Judgment of United States Court of Claims 21

OPINION OF ARMED SERVICES BOARD OF CONTRACT APPEALS.

Washington 25, D.C.
ASBCA No. 4255

Appeal of
The Austin Company
Under Contract N600s-s-37282

FINDINGS OF FACT

1. This is an appeal from the Contracting Officer's termination of the subject contract for default. The contract called for a digital data recording system to be constructed in accordance with a specified basic design. The precision called for by the contract could not be achieved with that design. Appellant, having diligently endeavored to perform, contends that the termination should be deemed as one issued for convenience of the Government. The ultimate question before the Board, pursuant to the provisions of paragraph (e) of the default clause (article 11), is whether failure to perform was due to causes beyond the control and without the fault or negligence of Appellant.

2. Two features of impossibility arose during the transaction embraced by this contract. One became evident before the contract was made; the other, somewhat related to the first, prevented contract performance. Both are pertinent in the dispute presented by th s appeal and, as hereinafter explained, circumstances leading to the making of the contract are important in the case.

3. The beginning of the circumstances leading to this contract relates to the need at the David Taylor Model Basin for a large amount of data for use in its measure-

ment work. Some automatic method for processing data was desired and several years ago a study was started towards development of a system to record large masses of data on shipboard in a form suitable for introduction into an automatic digital computer for processing. Technical personnel at the Model basin devoted over two years to the study and preparation of a report describing units for recording and transcribing pertinent data into desired forms. The report was called Report 778; it was also called Technical Specifications for Digital Data Recording and Transcribing System and it was intended to constitute specifications for equipment upon which a contract would be based. It described a system to gather data simultaneously from many remote locations, to amplify and bring the information to a central point, to repeat the data there, to encode it, or convert it to digital form, and to record it on magnetic tape. In some channels as many as five samplings of information per second were required. The described system also called for an additional unit to transcribe the data from the magnetic tape into a form suitable for use in a Univac digital computer. The specification (Report 778) set forth the functional requirements of the system, including the degree of precision expected in various operations. It also described a logical design, in terms of basic concepts, to meet the functional requirements upon which contract proposals were to be based. The first operation in each data channel called for the use of a servomechanism to receive the input signal from a remote location and to align the analog-to-digital converter with the value of the analog signal. The next specified operation called for an analog-to-digital converter to convert the analog signal to a new signal representing the value of the analog in digital form. The issues involved in this appeal primarily concern the first operation using the servo-

mechanism and there is no need to describe other operations. It may be noted, however, that the specifications permitted prospective contractors to propose an alternate system for consideration by the David Taylor Model Basin in the event that a prospective contractor felt that it could produce a more desirable system meeting the functional requirements set forth in the specifications. It may be noted, also, that the specifications described only basic concepts to be incorporated into the system, leaving development of exact design of the various elements of equipment to prospective contractors. This was true with respect to the servo-mechanism device.

4. A servo-mechanism consists of a number of components, electrical or mechanical or hydraulic in nature, to form a device to cause one shaft called the output shaft to assume the position indicated by another called the input shaft. The difference between the position of the input shaft and the position of the output shaft is known as the following error. As a matter of fact the device depends for its operation on the existence of a following error, for, in effect, the output shaft is driven by this error. There are a large number of possible arrangements to form conventional servo-mechanisms. New arrangements are being invented. The art is still growing.

5. Appellant, a contractor specializing in research and development work in the field of automatic controls, was one of many firms invited to submit proposals for furnishing the equipment called for by the specifications. After a study of the functional requirements, Appellant concluded, on the basis of its previous experience, that it would not be practical or feasible to employ a servo-mechanism. The repetition of signals generated at remote locations by shafts rotating at the specified high velocities, with fast accelera-

tions and decelerations, could not be achieved with the precision contemplated by the specifications. Lack of precision is due to the lag or lead, or following error, of any servo-mechanism in repeating rotation of other shafts. This following error becomes more serious with changes, such as acceleration and decelerations, in the rotation. Thus, in its first perusal of the Government's specifications Appellant discovered that it called for precision which was infeasible, or impossible, by adhering to the basic design as described in the document. Upon such discovery Appellant's project engineer telephoned the Government's engineer (who had prepared the specifications) informing him to the effect that the specifications contained infeasible requirements and suggesting that the servo-mechanism and its following error be eliminated from the design by attaching a unit called a quantizer (developed by Appellant) directly to each remote shaft and thereby obtain a shaft-position-to-digital converter. The Government's engineer, however, was not in accord with this suggestion because the equipment was intended to be used on ships in connection with rotating shafts in inaccessible positions and it would be too inconvenient to install quantizers directly to remote shafts each time a ship was boarded for collection of data. Although the record before us does not show whether the Government's representative was convinced of the infeasibility of his design by this telephone conversation, it does show that before a contract was made enough inquiries were made about the same matter by other prospective contractors to convince the representative that the design described was not adequate to meet the precision of performance desired; i.e., the design was based on a misconception of the state of the art of producing servo-mechanisms with accuracy. Any straight servo-mechanism known at the time (and now)

operates with a following error too large for the suggested precision to be met.

6. Undaunted by the technical conflict existing in the Government's specifications or by the Government's negative response to the suggestion that servo-mechanisms be eliminated from the system, Appellant studied the problem further and proceeded to invent implementation which might, if incorporated into the scheme of a conventional device, instantaneously compensate for the following error of the servo-mechanism and permit design of circuitry which could perform with precision. Generally, the analog to be supplied by remote shafts to the input shaft of a servo-mechanism (the initial point in equipment to be supplied by a contractor) was to be in terms of voltage. Appellant conceived the idea of using a conventional electronic servo amplifier and a conventional servo-mechanism as the basic follower device, to digitize the error voltage (following error) with an Austin Quantizer (and its associated control unit) at the instant of data sampling, and to add the quantity of this error (in digital form) to the output of the analog-to-digital converter (also an Austin Quantizer). Theoretically, this process would overcome the problem of imprecision which otherwise would exist in use of a conventional servo-mechanism without implementation. Further, in connection with this process, Appellant planned to use clock generated pulses of sufficient accuracy to supply the "command pulse" for timing the data samplings (in some cases as high as five per second) required for the various channels. After developing (on paper) the technical scheme of equipment to accomplish the purposes set out in the Government's specifications, Appellant submitted, by document dated 1 June 1954, a proposal for a contract to furnish the equipment. Appellant's proposal was comprehensive in a

technical sense; it was supported by literature showing scientific data relative to performance of an Austin Quantizer; it indicated that Appellant proposed to furnish equipment which would operate with precision much higher than called for by the Government's specifications; and it contained an offer to the effect that if given a contract Appellant would render a complete service and undertake the project "on an undivided responsibility basis."

7. Government representatives were impressed with Appellant's proposal. Knowing that their specification, as written, could not be expected to produce equipment with desired accuracy, they were interested in negotiating with Appellant with respect to its proposal. So, upon invitation, Appellant's engineer visited the David Taylor Model Basin to discuss the techniques which Appellant had in mind for building the equipment. The discussion included an explanation of the manner in which Appellant proposed to measure the following error of the servomechanism and accommodate its correction. As a result of this conference Appellant, by letter dated 28 July 1954, supplemented and revised its technical proposal of 1 June, mainly with respect to precision. During this negotiation Appellant unquestionably, on the basis of the evidence, proffered its proposal to the effect that a contract based thereon would be feasible, that the precision obtained thereby would be much greater than mentioned in the Government's invitation for proposals, and that Appellant was willing to agree to make the indicated higher precision a matter which it would promise to attain as a contractual requirement. The contract was integrated on the basis of Appellant's proposal; i.e., pertinent aspects of Appellant's proposal were bodily incorporated and conflicting aspects of the Government's invitation for proposals were deleted. It provided that the specification,

as so modified, was "primarily a performance type specification and complete compliance with the performance requirements shall be required." The performance requirement, to the extent pertinent here, was that the total number of counts for full range on the analog-to-digital computor as shown for each channel in Appellant's proposal was adopted and the precision of recorded values within plus or minus one count was required. This precision was of a much higher order than suggested by the Government's original specifications. The contract was executed on this basis by the parties as of the date of 11 August 1954. Thus, for the price of $167,000.00* Appellant promised to manufacture and deliver one digital data recording and transcribing system which would perform in accordance with the requirements as set out in the integration.

8. In performance, Appellant went about its task without inhibition on the part of the Government. In fact, just before execution of the contract Appellant conceived an idea of an improvement to its implementation of the servo-mechanism. The new scheme was to measure and compensate for the following error within the analog domain and to digitize the remote data as if there were no servo-error. It would employ only one digitizer (Austin Quantizer and its associated control unit) where Appellant's earlier scheme required two of them. Scientifically, the idea seemed sound and, without mentioning the change to the Government, Appellant proceeded first to develop the complete design and then to build equipment with its circuitry.

9. Progress reports to the Government were made from time to time. Also, since the contract contained a

---

* By an amendment dated 1 November 1954 three additional data channels were added, increasing the price by $10,500.00.

clause for progress payments, partial payments based on the progress reports were made to Appellant. The recorder system alone involved 19 blocks of equipment, so as to provide 19 separate channels as specified for recording data. Such a system with the dynamic performance characteristics, as required by this contract, using servomechanisms to recreate data from remote locations had never been constructed. Nor was such a system known at the time when the contract was executed (nor is it known today). Successful performance required that Appellant produce beyond the state of the art in this field.

10. A model of the recorder unit was constructed and tested in Appellant's laboratory. From the outset, Appellant was unable to achieve, in some channels, the precision required. This was due to a phenomenon which has been called "jitter," created by electrical noise of either electrical or mechanical origin. This noise was attributable to such things as vibration of shafts, play in bearings, play in gears, and a variety of electrical disturbances which might occur in any highly sensitive electronic system. The phenomenon affected the stability of the timing of the command pulse, which timing called for accuracy of 10 microseconds, or better. This jitter presented the major obstacle to Appellant's successful performance, especially so in the data channels which involved remote shafts rotating at high velocities.

11. By July 1956 fabrication and manufacture of all assemblies were substantially complete. Although improvement to the stability of the timing pulse had been brought about, jitter remained as the chief problem for final adjustment before obtaining proper operation of the system. Much work in search of the solution of this problem had been done. Studies indicated that a large part of

the noise causing jitter was attributable to such things as backlash, shaft deflections, eccentricities, and axial and radial play in the timing gear train. Whenever possible Appellant reduced the effect of such things by installing good components with close tolerances. Another large part of the noise was attributed to the synchro control transformers and in the filter of the digitizer demodulator circuit. Although Appellant tried in every way it could to reduce noise, timing precision no better than 40-50 microseconds was obtained. Since the system was based on timing precision much greater; the timing was not good enough to provide, in some channels, the precision required by the contract. Appellant, however, was not ready to concede failure and continued its efforts to reduce the noise.

12. Time for performance had been extended from time to time. By late 1956, however, the David Taylor Model Basin became anxious for delivery of the equipment. At one of the conferences between Appellant and Government representatives a suggestion was made to the effect that, with a reduction in price, performance might be accomplished by delivering the equipment with jitter of 40 microseconds. However, this suggestion was not carried out because more precision was desired for the purpose for which the equipment was to be used. Although Appellant seemed resolved to reduce the jitter to the limits of its resources, it was also expressing opinion to the Government to the effect that it was impossible to accomplish the precision required for some of the channels.

13. In January 1957 the Contracting Officer, deeming progress as too slow, pressed Appellant for statements as to completion of the work and delivery of acceptable equipment. After appraising its situation, Appellant informed the Government to the effect that many problems re-

mained to be resolved and that 30 June 1957 was the best estimate which could be offered as a date for delivery of equipment which, though having less precision in some channels than called for by the contract, Appellant thought might be acceptable. This advice was not satisfactory with the Contracting Officer and, by letter dated 6 February 1957, he notified Appellant that unless it could guarantee acceptable delivery by 15 March 1957 the contract would be terminated for default. In response, by letter dated 14 February 1957, Appellant wrote to the Contracting Officer as follows:

* * * * *

Gentlemen:

Reference is made to your letter of 6 February 1957 and our conference in your office on 12 February 1957 on the subject contract. Your letter notified us that unless we can advise you by 15 February 1957 that we can guarantee acceptable delivery by 15 March 1957 you intend to terminate the contract for default.

On 22 January 1957 we notified David Taylor Model Basin by telephone that we expect to deliver by 30 June 1957. Nothing has transpired since that date to alter the facts that led us to this conclusion. If you find the date of 30 June 1957 unacceptable to you and you decide to terminate the contract, we feel that you will be obliged to do so under Section 21 of the General Provisions of the contract, entitled "Termination for the Convenience of the Government," since the termination will be "due to causes beyond the control and without the fault or negligence of the contractor."

The technical requirements contained in the specification for this equipment are extremely exacting. No equipment capable of the specified performance had been built at the time that we submitted our proposal, either by

us or by anyone else. Neither does such equipment exist anywhere today. Consequently, the work required under this contract constituted research and development, and should properly have been performed under a research and development contract rather than under a fixed price supply contract.

Since nothing capable of fulfilling the requirements was available, it was necessary to base our proposal upon a novel approach that had not been tested nor proved at the time.

It is well known that the development work involved in reducing new concepts to practise often takes much longer and costs much more than even those best qualified to judge are able to anticipate. This has been the case under this contract. Even though we had not as yet obtained the required results at the time of the specified delivery date of the contract, we continue to pursue the work diligently, and regardless of cost to us, because of our determination to fulfill a contractual obligation. As a result, our costs on this contract through January 1957 totalled $284,000.00, whereas the fixed price specified in the contract is $177,500.00. We estimate that we will spend an additional $30,000.00 to complete the work.

It was only after we had spent considerable time and effort, actually in the field of practical research, that we could foresee that full achievement of some of the most exacting requirements of the specifications was virtually impossible in light of the existing state of the art.

Therefore, although we expect to complete the work on 30 June 1957, we cannot at this time guarantee that the equipment will meet the most stringent of the specification requirements to the last detail. It is our full intention to meet these requirements to the extent that it is physically possible to do so. We do not intend to continue our efforts

beyond the point at which they cease to be productive of results. The equipment that we deliver will certainly represent a very substantial improvement over anything now available, will fully meet most of your specified requirements, and will represent the nearest approach within the state of the art toward fulfilling the most stringent of your requirements.

We are certain that any termination under the present circumstances would not constitute "default pursuant to Section 11 of the General Provisions" but would be governed by the provisions of Section 21 entitled "Termination for the Convenience of the Government."

Very truly yours

* * * * *

On 20 February 1957 the Contracting Officer, being of the opinion that Appellant was failing to attain the precision required in all data channels and that such requirements were possible of attainment, invoked the default clause (article 11 of Standard Form 32), terminated the contract under the terms of that article, and demanded that Appellant refund $126,468.75* representing progress payments which had been made pursuant to the clause providing for such payments up to 75% of the price. Appellant timely appealed from this decision.

14. At the hearing, on appeal, testimony by engineers was submitted to show how a servo-mechanism functions, why such a device without implementation will not achieve the accuracy suggested in the Government's specifications, how Appellant proposed to implement a conventional de-

---

* Papers before the Board contain statements by the parties amounting to a stipulation to the effect that the Government has recovered the $126,468.75 together with $235.16, as interest, by means of withholdings from other contracts.

vice, why this implementation seemed sound from a scientific viewpoint (i.e., on paper), why Appellant's later modifications were in reality improvements to that implementation, how (after contracting) Appellant diligently proceeded to development of exact designs of the system and to manufacture equipment based on that design, how jitter (noise) was encountered in the timing elements of the device and how this jitter brought about imprecision, what caused the jitter and what Appellant did in effort to reduce it, and why it was impossible to reduce the jitter sufficiently to achieve (on some channels) the precision required by the contract. On this evidence we find that in making its proposal for this contract Appellant, in good faith, was convinced that by using its invention to implement a servo-mechanism it could manufacture equipment which would operate with the precision stated in its written proposal for a contract; that in negotiations Appellant convinced the Government that the proposal was sound and that Appellant could produce as stated therein, that in performance Appellant employed practices generally accepted and recognized by careful, prudent and competent engineers; that the phenomenon called jitter brought about imprecision too great to permit the accuracy required in some channels; that the jitter was caused by mechanical noise generated principally by ball bearings rotating at high speeds in components used by Appellant in its scheme for implementing the servo-mechanism; that Appellant's endeavor to overcome the noise and to perform was diligent in all respects; and that, in the existing state of the art, it is impossible to manufacture a digital data recorder which employs a servo-mechanism, even if implemented by any known scheme, to repeat data of the type specified from a remote source with the precision required by this contract.

DECISION.

15. The ultimate question before the Board for decision is whether the cause of Appellant's failure to perform is excused by the exculpatory provisions of the default article. Paragraph (e) of the default clause provides:

> If, after notice of termination of this contract under the provisions of paragraph (a) of this clause, it is determined that the failure to perform this contract is *due to causes beyond the control and without the fault or negligence of the Contractor.* * * * such Notice of Default shall be deemed to have issued pursuant to the clause of this contract entitled 'Termination for the Convenience of the Government' and the rights and obligations of the parties hereto shall in such event be governed by such clause. (Emphasis supplied.)

Appellant contends to the effect that under the facts and circumstances of this contract, properly construed, it is entitled to a determination to the effect that the failure to perform was due to causes beyond Appellant's control and without its fault or negligence.

16. Appellant, using definitions applied in legal literature to the words "control," "fault," and "negligence," argues that when other provisions of this contract are read with paragraph (e) of the default clause, quoted in pertinent part above, the meaning to be attached to the whole contract is that Appellant's obligation in performance extended only to a duty to exercise the skill and competence of ordinary prudent and skillful engineers engaged in a similar field of enterprise. Appellant argues, further, to the effect that if the practices employed by it during performance are found to have been in accord with generally accepted and recognized practices in use by careful, prudent and competent engineers, there must follow a deter-

mination that the failure to perform this contract was due to causes beyond the control and without the fault or negligence of the contractor. In reaching this interpretation Appellant states to the effect that, regardless of the consequences under different circumstances, impossibility of performance has no bearing in this case because the exculpatory provisions of the default clause expressly provide what the rights of the parties should be in such eventuality. Appellant's position seems to be based on an assumption that under a contract with a clause such as paragraph (e), quoted above, impossibility of performance is always an excusable cause for non-performance if the contractor acts with diligence. We do not think that such a result always follows. In our opinion the consequences of impossibility of performance must be analyzed before a determination can be made as to whether impossibility is an excusable cause for failure of a contractor to perform.

17. Performance of contracts may be prevented by several degrees and kinds of impossibility. In such disappointment the rights of the parties vary with circumstances. See Chapter 74, *Corbin on Contracts*. The question of impossibility in connection with the standard default article (Standard Form 32) has been before this Board on numerous occasions. In many cases where performance ended in disappointment, we have found various kinds of impossibility to have been excusable causes* of failure to perform. Of the various kinds of impossibility, there is one which should be discussed here because it is of the kind presented in this appeal. This kind comes about when the parties execute a contract for a fixed price calling

---

* For examples see *Quality House Specialties Corp.*, ASBCA No. 996; *Pannier Corporation*, ASBCA No. 479; *Gitlin Bag Co.*, ASBCA No. 1136; *General Contracting Corporation*, ASBCA No. 1423; and *Society Brand Hat Co.*, ASBCA No. 1368.

for the manufacture and delivery of an article in accordance with specifications impossible of performance or in accordance with performance requirements impossible of attainment. Usually, such contracts are made when both parties, acting in good faith, believe that performance can be accomplished even though the article may have never been manufactured before or the requirement had never been achieved. When, in such cases, performance ends in disappointment and the contract is terminated pursuant to the terms of the default clause, it becomes imperative that a determination be made, as a matter of interpretation, as to which party agreed to assume the risk of impossibility of performance. Comment (c) under Section 456, *Restatement of the Law of Contracts*, states the problem as follows:

* * * * *

> c. Parties may bind themselves by contract to perform what is in fact impossible. It is only where the promisor has no reason to know of the facts to which the impossibility is due, and where he does not agree to bear the risk of their existence that the formation of a contract is prevented. Parties deal with reference to unknown existing facts in the same way that they do with supervening events, and so also does the law. Risk is not assumed by a promisor unless, on an interpretation of the contract in the light of accompanying circumstances and usages, an intention is manifested that it shall be assumed. Otherwise the risk is on the promisee.

* * * * *

Applying an interpretation with respect to assumption of risk into the consideration of the exculpatory provisions of the default clause, it follows that, if the Government has agreed to bear the risk of feasibility of contract provisions, impossibility of performance, if in fact it exists, is an excusable cause for the contractor's failure to per-

form. Appellant's interpretation of the contractor's duty (see paragraph 16, above) is sound in contracts made in such circumstances. As an illustration, this was the situation in the case in *E. L. Cournand & Company, Inc.*, ASBCA No. 2955, 60-2 BCA § 2840, where the Government was responsible for the design of an item to be manufactured and where the contractor neither knew nor had reason to know that the design was inadequate to produce an item which would perform as required by the contract. On the other hand, if a contract is executed in the light of circumstances which would place the risk of achieving a new or difficult objective upon the contractor, impossibility is not an excusable cause for that contractor's failure to perform. Under such a contract, the contractor's obligation goes beyond the mere duty to exercise the skill and competence of ordinary prudent and skillful craftsmen engaged in a similar field of enterprise; his obligation does not stop until performance is reached and, if the task is impossible, he must bear the cost attributable to non-performance. As an illustration, this was the situation in the case of *Aerosonic Instrument Corp.*, ASBCA No. 4129, 59-1 BCA ¶ 2115, where the contractor knew, or should have known at the time of contracting, that it was obligating itself to make a scientific break-through and produce beyond the existing state of the art; and where it was familiar with the risk which it was assuming. After termination of that contract for default, attributable to impossibility, the Board refused under the circumstances of that case to find that the cause of the failure to perform was due to causes beyond the control and without the fault or negligence of the contractor.

18. For reasons indicated below, we find that the instant appeal is governed by the principles in the case of *Aerosonic Instrument Corp., supra.*

19. The technical design, in basic concept and in exact detail, of the unit involved in this appeal and the expression of precision with which such a unit of Appellant's manufacture would perform, emanated from Appellant. While it is true that negotiation for a contract originated by the Government inviting proposals for designing and manufacturing a system employing certain basic concepts as set out in the Government's specifications, Appellant was among the first of prospective contractors to recognize the fact that those specifications called for precision which could not be obtained by using the concept as specified. Appellant, as well as some other prospective contractors, informed the Government of the infeasibility of its specification. Then, while both Appellant and the Government were free to refrain from basing a contract on specifications known to be infeasible, Appellant came forward with a design invention of its own implementing the Government's specification, offered to produce equipment with precision much greater than previously suggested by using its implementation, and proposed a contract for the manufacture of equipment with such greater precision. The Government became interested in the proposal and invited Appellant to come in for further explanation and discussion of the technical aspects of the proposal. Apparently, Appellant's scheme for performance was convincing. From a scientific viewpoint, according to testimony of experts in the field, Appellant's concept for implementing a servo-mechanism device seemed (on paper) to be a complete solution to imprecision ordinarily expected in conventional devices of this sort. After further negotiation the parties integrated a contract which permitted use of Appellant's scheme and required the precision which Appellant had indicated as that which could be expected. Thus Appellant, with full knowledge of being confronted with perilous scientific development and with

hazardous manufacturing achievement, promised for a fixed price to develop and produce equipment with precision which the existing state of the art had never before accomplished. In the light of the circumstances accompanying the making of this contract, we must hold that Appellant assumed the risk of unsuccessful performance.

20. In performance, the equipment manufactured by Appellant produced a phenomenon called jitter which affected precision of operation. Although its effective nature was electrical, this jitter was caused by mechanical noise generated principally by ball bearings rotating at high speeds in components used by Appellant in its scheme for implementing the servo-mechanism. Manufacturing skills were insufficient for Appellant to manufacture or procure components with the exactness required to eliminate the noise. Hence, because of impossibility, Appellant did not perform the contract.

21. We have found that in making the contract Appellant assumed the risk of performance. Remaining for disposition is the question of whether, in this case, impossibility of performance is excused by the default article. In the case of *Aerosonic Instrument Corp., supra*, the Board, in determining this question, said:

> We conclude not. The real test under the Default Article is whether impossibility of performance came about through circumstances which were beyond the control and without the fault or negligence of the contractor.

The impossibility of performance of this contract came about upon its execution. It existed because the provisions integrated went beyond the related state of the art. Appellant assumed the risk of the hazard so created; it was the author of the precision promised. We think that the impossibility of contract performance in this case had its origin in matters over which Appellant had control and

that the failure to perform is not excused by the exculpatory provisions of the default article.

22. For reasons indicated above, the appeal is denied.

Dated: 12 January 1961.

s/ HERBERT D. TAYLOR, *Member of Division No. 4, Navy Contract Appeals Panel*

I Concur

s/ SEWARD H. BOWERS, *Member of Division No. 4, Navy Contract Appeals Panel*

I Concur

s/ CARL A. TURMO, *Chairman, Navy Contract Appeals Panel, and Member of Division No. 4*

I Concur

s/ BENJAMIN A. THEEMAN; *Member of Division No. 4, Navy Contract Appeals Panel*

I certify that the foregoing is a true copy of the decision and views of the Navy Contract Appeals Panel of the Armed Services Board of Contract Appeals in ASBCA No. 4255, appeal of the Austin Company under Contract N600s-s-37282. I further certify that there has been filed with the Recorder a statement by the Chairmen of the respective Panels of the Board that they have reviewed on behalf of their respective Services the above-captioned decision of the Navy Contract Appeals Panel and that in their opinion further, formal, and exclusive decision by the three Panel Chairmen is not required.

Dated 6 February 1961

s/ GEORGE L. HAWKES, *Recorder Armed Services Board of Contract Appeals.*

OPINION AND JUDGMENT OF COURT OF CLAIMS

IN THE UNITED STATES COURT OF CLAIMS

No. 177-61

(Decided March 6, 1963)

314 F. 2d 518

THE AUSTIN COMPANY v. THE UNITED STATES

Leward C. Wykoff for plaintiff. *Thomas V. Koykka*, *Edward C. Adkins* and *Arter, Hadden, Wykoff & Van Duzer* were on the briefs.

Alfred H. O. Boudreau, Jr., with whom was *Acting Assistant Attorney General Joseph D. Guilfoyle*, for defendant.

Before JONES, *Chief Judge*; WHITAKER, *Judge*; LARAMORE, *Judge*; DURFEE, *Judge*; and DAVIS, *Judge*.

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

LARAMORE, *Judge*, delivered the opinion of the court:

This case is being heard on plaintiff's motion and defendant's cross-motion for summary judgment, and involves interpretation of a contract which plaintiff says was later found to be impossible of performance.

The Austin Company, plaintiff, entered into a contract with the United States on August 11, 1954, to design, manufacture, test and deliver a Digital Data Recording and Transcribing System, for the contract price of $177,500. This was to be a system, incorporating the use of a servomechanism, to gather data from remote locations aboard a ship, amplify the information so gathered, and transmit it to a central point where it was to be converted to digital form suitable for use in a computer and finally recorded

on magnetic tape. No system of this kind had ever been previously manufactured or developed.

Before execution of the contract, the plaintiff reviewed the defendant's specifications and determined that the system as so described could not be manufactured with the required precision set forth in the specifications because of the inherent time lag involved in the operation of the servo-mechanism. The plaintiff then studied the problem, and on June 1, 1954 submitted a technical proposal embodying modifications of the defendant's specifications, including an implementation designed to compensate for the characteristic error of the servo-mechanism. The plaintiff's proposal also contemplated a system having greater accuracy than that outlined in the defendant's specifications. After conferring with the defendant's representatives, the plaintiff further supplemented and revised its proposal. Both the defendant and the plaintiff believed the plaintiff's proposal sound and workable and would result in a more precise system. Therefore, the plaintiff's proposal was incorporated into the specifications of the contract which was then signed on August 11, 1954.

The plaintiff diligently proceeded to attempt to develop and manufacture the contracted-for system, and incurred expenditures of $290,000 to this end. However, due to a phenomenon called "jitter", which is noise of electrical or mechanical origin caused by vibrations and other disturbances, and which sometimes occurs in highly sensitive electronic systems, it was discovered that it was impossible for plaintiff to manufacture the called-for system, as specified, with the desired precision. After granting plaintiff several extensions of time to produce the system, the defendant finally terminated the contract when it became apparent that plaintiff could not make the system as required.

The main question before the court is whether, under the termination provisions of the contract, the plaintiff is entitled to recover the expenditures, not in excess of the contract price, which it incurred in its effort to manufacture the contracted-for system. Plaintiff's primary claim is that it is entitled to recover such expenditures because its nonperformance was, in the words of the contract, "due to causes beyond the control and without the fault or negligence of the Contractor."

The aforementioned clause is further implemented by another provision of the contract, which reads as follows:

> (b) The Contractor shall not be liable for any excess costs if any failure to perform the contract arises out of causes beyond the control and without the fault or negligence of the Contractor. Such causes include, but are not restricted to, acts of God or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, and defaults of subcontractors due to any of such causes * * *.

Other termination provisions of the contract provide that when the contractor's failure to perform is due to causes beyond the control of the contractor, as determined in the above-quoted provision, the contract shall be considered terminated for the convenience of the Government and the contractor may recover its costs, not in excess of the contract price, incurred while attempting to perform.

The facts here indicate that plaintiff's failure to perform was solely due to the fact that it was impossible for it to manufacture a workable system as set forth in the specifications, which were the plaintiff's own design. However, the Government strongly urges that the system proposed in the contract was not impossible of being devel-

oped. Whether it was or was not, we do not know. All we do know is that plaintiff could not develop the system according to its plans. This, however, is not to say that the proposed system was impossible of manufacture. It certainly was foreseeable. For example, in the not too distant past, while perhaps foreseeable, no organization would have thought possible, or undertaken a contract to construct a device whereby a living human body could be put in orbit around the earth; nevertheless it has been accomplished. Thus, in this case, we cannot categorically say that it was or is impossible to achieve the goal called for in plaintiff's contract.

Notwithstanding this, because plaintiff could not develop the system as planned, it claims that its failure to perform was due to causes beyond its control and thus is excused under the exculpatory provisions of the contract.

The defendant disputes plaintiff's claim that its failure of performance was covered by the exculpatory termination clause in the contract. Defendant contends that the clause in question was limited to excuse of nonperformance solely due to occurrence of extraneous contingencies of the kind specifically enumerated thereunder. Defendant cites the rule of *ejusdem generis*, i.e., general words in a contract are limited by particular words to things of the same *kind or class*, to support its contention that the words "causes beyond the control" refer solely to extraneous factors which might prevent performance, because only these kind of factors were enumerated in explanation of the causes to be considered.

We agree with the defendant that the rule of *ejusdem generis* is applicable to interpretation of the nonperformance clause in this contract, and operates to restrict the clause to exculpation of nonperformance due to the kind or class of extraneous contingencies enumerated therein.

i.e., acts of God, etc. As we view the issue, if the plaintiff's failure of performance was due to the absolute impossibility of performance inherent in the subject matter of the contract itself, and which impossibility already existed at the time the contract was entered into, plaintiff's failure would not be excused under the exculpatory clause of the contract. See *Carnegie Steel Company v. United States*, 240 U. S. 156.

Furthermore, on an overall view of the facts of this case, we think that plaintiff is not entitled to recover. Plaintiff was not under any compulsion to enter into the contract. However, before it did so contract, it studied the specifications prepared by the defendant and decided they were unworkable. It then proposed changes in the specifications and, after further study, revised its proposed changes and assured the defendant that a contract based thereon would be performed and additionally would result in a system of greater precision than that originally required by the defendant. When the formal contract was executed by the parties on August 11, 1954, it incorporated the pertinent aspects of plaintiff's proposal and deleted the conflicting aspects in the original specifications.

Thus, while free to refrain from contracting, plaintiff came forward with its own design which was integrated into the contract. From the above, it is readily apparent that plaintiff believed it could not perform under the Government's specifications. However, it not only believed possible, but *promised* to perform under its own substituted specifications. Under these circumstances, we are faced with the fact that plaintiff had full knowledge of the perils of performance and entered into the contract with its eyes open. This, in our opinion, would indicate that plaintiff fully assumed the risks of impossibility of performance. It also underscores our earlier conclusion

regarding the nonperformance clause of the contract, in that had the parties intended to shift the risk of impossibility of perfecting the system from the plaintiff to the defendant, they doubtlessly would not have relied on such an inappropriately worded clause referring only to extraneous contingencies.

In addition, this court has always held that the Government is responsible for its own specifications and, if for any reason, plaintiff had been hindered in performance or suffered losses by reason thereof, due to defective specifications, the Government is liable for such losses. See *Helene Curtis Industries, Inc. v. United States*, No. 251-56, decided February 6, 1963, and cases cited therein. We can think of no reason why the converse of this should not apply to plaintiff.

In other words, plaintiff drew up the specifications and thereby undertook a firm obligation to perform thereunder. In this climate plaintiff must turn the same square corners as required of the Government and is bound by specifications of its own making.

If the plaintiff, under the facts and circumstances above outlined, were permitted to recover, it would be to say that a contractor assumes nothing upon signing a contract. It would permit a contractor to gamble on a contract of this nature and force the Government to pay the expense of its gamble. Under most circumstances contractors expend money, sometimes in great amounts, in preparation of a bid and then in preparation for performance. They take a risk and are bound by the assumption thereof, unless the contract specifically provides otherwise.

For the above reasons, plaintiff's motion for summary judgment is denied, and defendant's cross-motion is granted. Plaintiff's petition is dismissed.

BRIEF FOR THE UNITED STATE IN OPPOSITION

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 315

THE AUSTIN COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. 21) is reported at 314 F. 2d 518.

JURISDICTION

The judgment of the Court of Claims was entered on March 6, 1963. A timely motion for rehearing was denied on May 10, 1963. The petition for a writ of certiorari was filed on July 29, 1963. The jurisdiction of the Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Petitioner contracted with the government to manufacture certain equipment according to petitioner's

699-093—63

own specifications, but was unable to deliver the promised equipment because its construction according to the specifications was "impossible." The question presented is whether the Standard Form Government Contract which the parties signed entitles petitioner to recover its expenditures, not in excess of the contract price, under these circumstances.

CONTRACT PROVISIONS INVOLVED

Standard Form Government Contract No. 32 provides in relevant part:

> Article 11.
>
> (a) The Government may, subject to the provisions of paragraph (b) below, by written Notice of Default to the Contractor terminate the whole or any part of this contract in any one of the following circumstances:
>
> (i) if the Contractor fails to make delivery of the supplies or to perform the services within the time specified herein or any extension thereof; or
>
> (ii) if the Contractor fails to perform any of the other provisions of this contract, or so fails to make progress as to endanger performance of this contract in accordance with its terms, and in either of these two circumstances does not cure such failure within a period of 10 days (or such longer period as the Contracting Officer may authorize in writing) after receipt of notice from the Contracting Officer specifying such failure.
>
> (b) The Contractor shall not be liable for any excess costs if any failure to perform the contract arises out of causes beyond the control and without the fault or negligence of the Con-

tractor. Such causes include, but are not restricted to, acts of God or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, and defaults of subcontractors due to any of such causes unless the Contracting Officer shall determine that the supplies or services to be furnished by the subcontractor were obtainable from other sources in sufficient time to permit the Contractor to meet the required delivery schedule.

* * * * * *

(e) If, after notice of termination of this contract under the provisions of paragraph (a) of this clause, it is determined that the failure to perform this contract is due to causes beyond the control and without the fault or negligence of the Contractor pursuant to the provisions of paragraph (b) of this clause, such Notice of Default shall be deemed to have been issued pursuant to the clause of this contract entitled "Termination for Convenience of the Government," and the rights and obligations of the parties hereto shall in such event be governed by such clause. * * *

Article 21.

* * * * * *

(e) In the event of the failure of the Contractor and the Contracting Officer to agree as provided in paragraph (d) [agreement as to amount of termination claim] upon the whole amount to be paid to the Contractor by reason of the termination of work pursuant to this clause, the Contracting Officer shall determine, on the basis of information available to him,

the amount, if any, due to the Contractor by reason of the termination and shall pay to the Contractor the amounts determined as follows:

(1) For completed supplies accepted by the Government * * *

(2). The total of—

(i) The costs incurred in the performance of the work terminated, including initial costs and preparatory expenses allowable thereto, but exclusive of any costs attributable to supplies paid or to be paid for under paragraph (e)(1) hereof;

(ii) The cost of settling and paying claims arising out of the termination of work under subcontracts or orders * * *.

(iii) A sum equal to 2% of that part of the amount determined under (i) which represents the cost of articles and materials not processed by the Contractor, plus a sum equal to 8% of the remainder of such amounts, but the aggregate of such sums shall not exceed 6% of the whole of the amount determined under subdivision (i) above * * *.

(3) The reasonable costs of settlement, including accounting, legal, clerical, and other expenses reasonably necessary for the preparation of settlement claims * * *.

The total sum to be paid to the Contractor under (1) and (2) of this paragraph (e) shall not exceed the total contract price as reduced by the amount of payments otherwise made * * *.

* * * * *

STATEMENT

The petitioner, a contractor specializing in research and development in the field of automatic controls,

was one of several firms invited to submit proposals for furnishing a digital data recording and transcribing system in accordance with technical specifications described in a report of the Bureau of Ships, Department of the Navy. After studying the functional requirements of the system, petitioner concluded that the necessary precision would not be achieved by the design described in the specifications. Upon further study, petitioner submitted its own proposal which modified the Navy's specifications and which purported to produce more precise equipment than that set out in the specifications. As further supplemented and revised, petitioner's proposal was incorporated into a standard government contract executed on August 11, 1954. The contract obligated petitioner to deliver the system to the government by August 1955 and fixed the price at $177,500.

The time for performance was repeatedly extended by the government at petitioner's request. Finally, on February 20, 1957, the contracting officer determined that petitioner's equipment was failing to attain the necessary precision and terminated the contract. He demanded the return of progress payments on the ground that the termination was attributable to petitioner's default. Petitioner had then incurred expenditures of $290,000, and it returned approximately $125,000 which had been made in progress payments.

Petitioner appealed from this determination of the contracting officer to the Armed Services Board of Contract Appeals. Petitioner claimed that it was entitled to recover the amount of its expenditures, not to exceed the contract price, because termination

was attributable to the impossibility of meeting the contract's requirements respecting the precision of the system. This default was said to be beyond petitioner's control and not the result of its fault or negligence, as contemplated by Article 11(b) of the contract (p. 2, *supra*). Petitioner contended that the termination was "for convenience of the Government" under Article 11(e) (p. 3, *supra*). Accordingly, petitioner invoked Article 21 of the contract (p. 3, *supra*), as the basis for recovery of its expenditures up to the contract price.

The Armed Services Board of Contract Appeals upheld the determination of the contracting officer, holding that the failure to perform was not excused by the exculpatory provisions of Article 11(b). The petitioner then brought suit in the Court of Claims, which granted the government's cross-motion for summary judgment.

ARGUMENT

This case presents no question of general or public importance in the field of government contracts. It hinges entirely upon well established and correctly applied principles of contract construction which do not require restatement by this Court.

1. After studying the specifications distributed by the Navy, petitioner decided that they were unworkable. Although it was free not to enter into any contract with the Navy, petitioner chose to develop its own design and to submit that design in a proposal. It was petitioner's own specifications which whetted the government's interest, and it was petitioner's own

specifications which were incorporated into the standard contract.

Under these circumstances, the Court of Claims was clearly justified in concluding that petitioner "had full knowledge of the perils of performance and entered into the contract with its eyes open" (Pet. App. 25). Since the specifications under which it promised to perform were its own, the risks of failure under these specifications should equitably have been borne by it. There is hardly reason to penalize the government by imposing upon it the costs of petitioner's overconfidence.

2. Nor is there any language in the contract to support the result which petitioner urges. The exculpatory default clause (Article 11(b)) applies only to causes "beyond the control and without the fault * * * of the Contractor." It enumerates "acts of God or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, and defaults of subcontractors due to any of such causes * * *." All these are contingencies "extraneous to [the contractual undertaking] and independent of the engagements and exertions of the parties." *Carnegie Steel Co. v. United States*, 240 U.S. 156, 167-166. The cause of petitioner's default was not extraneous, however. It stemmed wholly from petitioner's misplaced confidence in its ability to meet the Navy's performance requirements by using its own specifications.

Article 11(b) provides that its scope is not "restricted to" the enumerated causes. But the rule of *ejusdem generis* plainly limits its application. In the

Carnegie case, the contractor also asserted that its delay in delivering the equipment which had been ordered was occasioned by the unforeseeable difficulty of the scientific process which had to be employed. Accordingly, the contractor invoked the clause in the contract relating to unavoidable causes, "such as fires, storms, labor strikes, action of the United States, etc." (240 U.S. at 163). This Court rejected the claim on the ground that the cause of the default was not of the same "genus or kind" as those listed in the contract. The Court added, in terms which are applicable here, "Ability to perform a contract is of its very essence (*id.* at 165).

There is no merit to petitioner's contention that the *Carnegie* clause is distinguishable because it introduced the specific list with the phrase "such as" while in Article 11(b) of this contract the introductory phrase is "[s]uch causes include, but are not restricted to." The plain meaning of both phrases is that the list of particular causes is illustrative only.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

JOHN W. DOUGLAS,
Assistant Attorney General.

ALAN S. ROSENTHAL,
Attorney.

AUGUST 1963.

U.S. GOVERNMENT PRINTING OFFICE 1963

LIBRARY
SUPREME COURT, U.S.
SEP 5 1963
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. 315.

THE AUSTIN COMPANY,

Petitioner;

vs.

UNITED STATES,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

To United States Court of Claims.

LEWARD C. WYKOFF,
THOMAS V. KOYKKA,
EDWARD C. ADKINS,
Arter, Hadden, Wykoff & Van Duzer,
1144 Union Commerce Building,
Cleveland 14, Ohio,
Attorneys for Petitioner.

September 4, 1963.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-5647

TABLE OF CONTENTS.

I. Decision Below Gives to Standard Default Clause Used in Government Contracts Construction That, Contrary to Its Terms, Will Impose Unjustified Losses on Those Who Contract with Government 1

II. Decision Below Fashions New Rule of Ejusdem Generis 2

III. Court Below Disregards Findings Not Held to be Clearly Erroneous 3

Conclusion 3

Case Cited.

Carnegie Steel Company v. United States (1916) 240 U. S. 156 2

In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. 315.

THE AUSTIN COMPANY,

Petitioner,

vs.

UNITED STATES,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

To United States Court of Claims.

The Government (page 6) finds questions "of general or public importance" lacking by masking the fact that—

I. DECISION BELOW GIVES TO STANDARD DEFAULT CLAUSE USED IN GOVERNMENT CONTRACTS CONSTRUCTION THAT, CONTRARY TO ITS TERMS, WILL IMPOSE UNJUSTIFIED LOSSES ON THOSE WHO CONTRACT WITH GOVERNMENT.

The Government's response is that, because petitioner, The Austin Company, proposed revisions in the Government's original specifications (which, as all agree, were inoperable) it thereby made the specifications its own and, therefore (p. 7):

> "the risks of failure under these specifications should *equitably* have been borne by it."

The parties *bargained for, and wrote into the contract*, the result to follow failure in performance. To argue now

that "equitably" the loss should have been cast the other way is to rewrite the standard default clause.

For this there is no warrant in the Government's argument that petitioner, The Austin Company (p. 6),

"was free not to enter into any contract * * *".

This is true. It is no doubt true of every person who enters into a contract. Were it not so, there would be no "contract." But it supplies no license to rewrite the contract or to convert the relief provision of the standard default clause into a trap.

II. DECISION BELOW FASHIONS NEW RULE OF EJUSDEM GENERIS.

The contract provides that the causes excusing performance

"include, but are *not restricted to*"

the examples named. The Court of Claims reversed this. It held the provision operates

"*to restrict* the clause * * *".

The Government would support this 180° change in meaning by appeal to *Carnegie Steel Company v. United States* (1916), 240 U. S. 156. This will not do. The contract in *Carnegie Steel* restricted relief to

"unavoidable causes, *such as*"

those enumerated, thereby expressly limiting the grounds of relief to categories of the kind named. It was not so in the Austin contract. Any such meaning was expressly negatived by the recital that causes for relief

"include, but *are not restricted to*"

categories of the kind named. No amount of argument can blot out this distinction or drain from *Carnegie Steel* any support for the Government's argument or for the holding

of the Court of Claims. Instead, the Government's reliance—along with the Court of Claims—on *Carnegie Steel* emphasizes the need for review. The decision, obviously misread, has been used by the Court of Claims to justify a new and alarming rule of *ejusdem generis* heretofore unknown to the law.

Finally, lame though the Government's response is to the foregoing issues, it makes none at all to the further point that—

III. DECISION BELOW DISREGARDS FINDINGS NOT HELD TO BE CLEARLY ERRONEOUS.

The Court of Claims disregarded the findings of the administrative board from which the case came to it, without setting such findings aside or adjudging them erroneous. This the Court of Claims had no right to do.

On this issue the Government stands mute.

The point obviously needs—and surely deserves—the attention of this Court.

CONCLUSION.

Only by rewriting the standard default clause by use of a revised rule of *ejusdem generis*, and ignoring the findings—without adjudging them unsupported—could the Court of Claims declare the law it has loosed in this case.

The Court should grant the writ to restore order to this area of the law.

Respectfully submitted,

LEWARD C. WYKOFF,
THOMAS V. KOYKKA,
EDWARD C. ADKINS,
Arter, Hadden, Wykoff & Van Duzer,
1144 Union Commerce Building,
Cleveland 14, Ohio,
Attorneys for Petitioner.

September 4, 1963.